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No. 10-976

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FREEDOM HOLDINGS, INC., INTERNATIONAL TOBACCO PARTNERS, LTD., on behalf of themselves and all other similarly situated,

Petitioners,

—v.—

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, ROBERT L. MEGNA, in his official capacity as Commissioner of Taxation and Finance of the State of New York,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Alternative Brands, Inc.

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INTEREST OF *AMICI CURIAE*[1]

Alternative Brands, Inc., American Cigarette Company, Inc., Cherokee Tobacco Company, LLC, Cheyenne International, LLC, Dosal Tobacco Corporation, Firebird Manufacturing, LLC, Global Tobacco of Texas, LLC, National Tobacco Company, L.P., Prime Time International Company and Xcaliber International Limited, Inc., are cigarette manufacturers headquartered in the states of Arizona, Florida, Kentucky, North Carolina, Oklahoma and Texas. As are Petitioners, the *amici curiae* are classified as "Non-Participating Manufacturers" (NPMs) under the Master Settlement Agreement (MSA). As such, they are similarly harmed by the discriminatory and anticompetitive regulatory system established via the MSA and its mandated statutory enactments (the Escrow and/or Contraband Statutes) passed in New York and every other Settling State. This illegal framework imposes grossly disparate costs on NPMs, ultimately to the detriment of consumers, not just in New York, but across the country as part of a nationwide, largely successful effort to drive NPMs (*i.e.*, non-members to a private agreement) from the forty-six states that joined the MSA. Through a

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[1] In accordance with Supreme Court rules, the *amici curiae* submit this brief to bring to the attention of the Court relevant matter not already brought to its attention by the parties. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel have made a monetary contribution to fund the preparation or submission of this brief.

flawed misapplication of this Court's decisions dealing with Sherman Act preemption of state statutes the Second Circuit (as well as other courts rejecting similar challenges) failed to identify an impermissible, preempted conflict between the MSA and federal antitrust law.

SUMMARY OF ARGUMENT

This case arises from an unprecedented usurpation of state legislative power by private industry. In the opinion below, the Second Circuit, as did several courts before it, failed to acknowledge this basic fact, turning a blind eye to the anticompetitive restraints created by the state statutes implementing the MSA and, ironically, rejecting Petitioners' claim on the basis of the very principle that is most contravened in this case: specifically, state sovereignty and the sort of *independent* state action that is almost totally absent here. Although it rejected Petitioners' Sherman Act preemption claim explicitly on these grounds, the Second Circuit failed entirely to acknowledge the fundamental lack of sovereignty underpinning the entire MSA. Consequently, its preemption analysis – a *pro forma* inquiry divorced from its underlying rationales, rather than the inherently *substantive* examination of conflict between state and federal legal regimes mandated by this Court's decisions – misconstrues pronouncements of this Court to reach a conclusion that is not only wrong, but is diametrically inverted: the court *upheld* statutes as "unilateral" acts of the state when, in fact, they

represent an unparalleled *abdication* of the Settling States' independent authority.[2]

Given the MSA's national significance, it is of paramount importance that the Court grant Petitioners' request for a writ in this matter, so the MSA and its implementing statutes can be subjected to the kind of fully-conceived, coherent preemption analysis they have, thus far, avoided.

ARGUMENT

I. The Escrow and Contraband Statutes Are Anything But Unilateral, Sovereign Acts

The Second Circuit's opinion, like similar decisions of the Fifth, Sixth, Eighth, Ninth and Tenth Circuits,[3] disposes of Petitioners' preemption claim by characterizing the challenged statutes as "unilateral" acts of the state, not subject to preemption under *Fisher v. City of Berkeley*, 475

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[2] The instant brief does not analyze the dormant Commerce Clause issue. Nonetheless, the Second Circuit's analysis of that aspect of Petitioners' claim suffers from the same core deficiency – a failure to acknowledge the actual nature of the MSA statutes passed in concert by New York and every other Settling State and the clear absence of sovereign conduct reflected therein.

[3] *Tritent Int'l Corp. v. Kentucky*, 467 F.3d 547, 557-58 (6th Cir. 2006); *Sanders v. Brown*, 504 F.3d 903, 910-11 (9th Cir. 2007), *cert. denied*, 553 U.S. 1031, 128 S.Ct. 2427, 171 L.Ed.2d 229 (2008); *KT & G Corp. v. Attorney Gen. of Okla.*, 535 F.3d 1114, 1126-33 (10th Cir. 2008); *Grand River Enters. Six Nations, Ltd. v. Beebe*, 574 F.3d 929, 936-38 (8th Cir.2009), *cert. denied*, 130 S.Ct. 2095, 176 L.Ed.2d 723 (2010); *Xcaliber Int'l Ltd. v. Attorney Gen. of La.*, 612 F.3d 368, 374-77 (5th Cir. 2010); *S&M Brands, Inc. v. Caldwell*, 614 F.3d 172, 176-77 (5th Cir. 2010).

U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986). *See Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 39, 57 (2nd Cir. 2010). This conclusion can be reached only by avoiding consideration of numerous, directly relevant facts: specifically, the unsovereign nature of these obligatory statutes and the private agreement that required their passage, the MSA.

The contrast between *Fisher* and the instant matter is instructive. *Fisher* involved a rent stabilization ordinance passed by popular initiative in the city of Berkeley, California. Upholding the ordinance, the Court emphasized: "The distinction between unilateral and concerted action is critical here. ... We have ... deemed it 'of considerable importance' that independent activity by a single entity be distinguished from a concerted effort by more than one entity to fix prices or otherwise restrain trade[.]" *Id.* at 475 U.S. 266 (internal citations omitted).

The instant case challenges a level of concerted action, among all of the Settling States and OPMs, that is found nowhere in the facts of *Fisher*. As set forth in Petitioners' brief, this case involves unique levels of coordinated activity between private market participants, every state (at multiple levels of state government), and various external entities, such as the MSA's independent auditor, PricewaterhouseCoopers. The MSA can fairly be described as among the most "concerted efforts" ever undertaken by a group of states and private market participants. Moreover, the statutes at issue were plainly not passed with any degree of independence by any Settling State. They are *mandatory* obligations of the MSA and, unlike anything that has

ever come before them, were passed concomitantly, in *identical* form, by every Settling State. Plainly they are not "unilateral" in any meaningful sense of the word.

II. In the Preemption Context (But Not Elsewhere), Reviewing Courts Have Arbitrarily and Improperly Limited Their Reviews to the Face of the Escrow and Contraband Statutes Themselves

Despite the unique background of highly concerted action described above, the Second Circuit and other courts upholding MSA statutes have artificially confined their preemption analyses to the literal wording of the Escrow and Contraband Statutes themselves. A narrow examination of that sort is improper and not supported by the controlling opinions of this Court.

As an initial matter, a formulaic inquiry contravenes this Court's most basic pronouncements on preemption law. Preemption analysis requires *substantive* examination of conflict between state and federal legal regimes. Reviewing courts are called to "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 97 S.Ct. 1305, 1310, 51 L.Ed.2d 604 (1977). There is no place for purely academic or detached, perfunctory analysis. As the Court has instructed:

> There is not – and from the very nature of the problem there cannot be – any

> rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Sherman Act preemption is no different and decisions of this Court specific to antitrust law should, under no circumstances, be interpreted as qualitatively altering the necessary inquiry.

The Court's pronouncements in *Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982) – a case which involved a hypothetical challenge to an as-yet-unenforced liquor

regulation – are of particular import here. That opinion's language requiring, in the context of a facial challenge, a preempted statute to "mandate[] or authorize[] conduct that necessarily constitutes a violation of the antitrust laws in all cases," does not – despite the strained interpretations of several courts – in any way require or otherwise justify ignoring directly relevant evidence of a statute's origins and actual effects. Nonetheless, courts rejecting challenges to MSA statutes have erroneously relied on this language to replace meaningful conflict review with an academic inspection of OPM-authored statutory language. There is simply no authority for watering down the required analysis in that way.

Sherman Act preemption is necessarily a *substantive* examination; as such, under any meaningful interpretation, the *Rice* standard is clearly satisfied here. The MSA statutes raise the costs of specifically targeted market participants, as a direct result and explicit condition of a *private* agreement to restrict output and share costs – *per se* violations of the Sherman Act. Only by ignoring overwhelming evidence of concerted action – *i.e.*, pretending that these statutes sprang into existence as independent acts of numerous state legislatures and now operate in isolation from the very agreement that compelled their passage – can MSA legislation be found *not* to mandate or authorize *per se* illegal conduct.

It should also be noted that an isolated review of statutory language to find "unilateral" action is inconsistent with the remainder of the Second Circuit's (and other courts') *own* analysis, that is

undeniably cognizant of the entire MSA. In various contexts that do not involve the fallacy of unilateral state action, the Second Circuit was aware of the entire MSA landscape and the agreement's various impacts or effects; *e.g.*, the underlying state lawsuits and release from liability that led to the agreement, its restrictions on advertising and lobbying activities, and the payments it requires of Participating Manufacturers – payments which, critically, are substantially *lower* on a per unit basis than the escrow obligations of NPMs, that simply cannot compete in the current industry and provide meaningful downward pricing pressure on Participating Manufacturers (that, not coincidentally, have experienced record profits in the post-MSA era, despite their billions in MSA payment obligations). There is no justification for selectively ignoring this directly relevant MSA context when faced with the preemption question.

Further illustrating the incongruity of this approach, carried to its logical conclusion, it is self-defeating. That is, if, in fact, a reviewing court genuinely *did* ignore everything external to the statutes themselves, it could only find them to be all the more anticompetitive. Viewed in true isolation from the MSA, the statutes (which have no direct impact on Participating Manufacturers) simply impose costs on one set of market participants, leaving their competitors unaffected. Of course, its finding of unilateral state action notwithstanding, the Second Circuit's analysis is not actually so limited. It acknowledges and relies upon the existence of the MSA in numerous other contexts; thus, it cannot, with any consistency, conveniently

restrict the preemption analysis to characterize New York's action as unilateral.

The required examination does not expand or contract arbitrarily. It is substantive, and plainly must account for factors *external* to the literal wording of the statutes themselves; *i.e.*, the private agreement from which they arose and in the absence of which they would not exist. Under a genuine examination of that sort, the statutes exhibit an astounding degree of concerted activity and a conquest of state sovereignty by Big Tobacco. They bear no resemblance to *Fisher* and are anything but unilateral, sovereign acts of state.

III. Conclusion

This case is of obvious national import. It presents a remarkable set of circumstances, under which numerous state legislatures, operating under the thumb of the tobacco industry's largest players, have enacted a set of laws that unequivocally favors certain market participants (OPMs and grandfathered SPMs – the NPMs' direct competitors) over their rivals. Those laws result in artificially inflated prices to consumers and therefore run afoul of federal antitrust law. There is a real conflict between federal and state law here that cannot be disposed of by an artificially constricted analysis that ignores the overarching context that is the MSA and, in so doing, makes a mockery of the very concepts of state sovereignty on which it relies. Thus, this case cries out for review by this Court and a meaningful, consistent application of the principles of state

sovereignty that are at issue in this, and every, preemption claim.

For these reasons, the *amici* respectfully urge the Court to grant Petitioners' request for a Writ of Certiorari.

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Respectfully Submitted,

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